IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 13, 2007

GINA ORLENE WYNNE AMENT v. JOSEPH NOLAN WYNNE

Appeal from the Chancery Court for Giles County
No. 1938 Stella Hargrove, Judge

No. M2004-01876-COA-R3-CV - Filed on August 20, 2007

This case involves a dispute over the correct interpretation of the allocation of debt found in a marital dissolution agreement (MDA). The wife was awarded a Ford Explorer under the MDA and was made solely responsible for paying the note on the automobile. The husband was made responsible for "the small Community Bank note." The husband argues that "the small Community Bank note" is a $400 obligation related to a bad check. The wife argues that it is an obligation of over $21,000, secured by the Explorer, which is characterized as "small" to distinguish it from the $80,000 mortgage indebtedness for which the MDA makes her responsible. The trial court agreed with the wife, ordered the husband to pay the $21,000, and held that the wife had no financial obligation related to the Explorer. We reverse the trial court because its order negates the obligation the wife willingly assumed when she signed the MDA. We accordingly order the wife to pay the principal amount of the only note that was secured by the Explorer at the time of the parties' divorce.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT JR., JJ., joined.

Johnny D. Hill, Jr., Fayetteville, Tennessee, for the appellant, Joseph Nolan Wynne.

M. Wallace Coleman, Jr., Lawrenceburg, Tennessee, for the appellee, Gina Orlene Wynne Ament.

OPINION

I. A MARITAL DISSOLUTION AGREEMENT

The marriage of Joseph Nolan Wynne (Husband) and Gina Orlene Wynne (Wife) was terminated by a final decree of divorce on October 10, 2001. The divorce decree incorporated a Permanent Parenting Plan for the parties' two children and a Marital Dissolution Agreement which was drafted by Wife's attorney and was executed by the parties on August 30, 2001.

Under the terms of the MDA, Wife received the marital home. The agreement recited that the parties agreed that there was basically no equity in the home. The Personal Property section of the MDA stated "[t]he wife retains her [1992 Ford] Explorer and pays the debt on same holding harmless the husband for said debt and the husband retains the Mustang." The proof showed that Wife usually drove the Explorer, but that it was titled in the names of both Husband and Wife.

The section on debts reads as follows.

> 3. DEBTS. The parties agree that the debts are equitably divided by the wife becoming solely responsible for and holding harmless the husband in the Community Bank mortgage debt on the home, the Community Bank note on her Explorer, the FNANB Visa card, and the doctor bills of $391.00.
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> The husband will be responsible for and hold the wife harmless on the small Community Bank note and the Gibson's debt.

The MDA elsewhere recites that it is intended to be a final settlement of all property rights between the parties, that each has entered into the agreement of his or her own volition, that both have read all its provisions, have studied them carefully, and are in agreement with its terms. It further states that "[t]he provisions of this agreement shall not be modified or changed except by mutual consent and agreement of the parties expressed in writing."

II. A PETITION FOR CONTEMPT

On October 3, 2003, Husband filed a petition for contempt against Wife. He claimed that she had made no payments on the debt collateralized by her Ford Explorer, and that since his name remained on the note, he had made payments of almost $13,000 on the outstanding indebtedness "in an effort to salvage his credit and avoid having a judgment rendered against him. . . ." He asked the court to hold Wife in contempt, to grant him a judgment for the money he had paid on her debt, and to order her to make timely installment payments on any outstanding obligation under the MDA.

Wife answered and denied that she was responsible for the loan secured by the Ford Explorer.[1] She acknowledged that the MDA stated that she was responsible for the debt on the vehicle, but she nonetheless contended that "the loan on the Ford Explorer is one and the same debt as the 'small Community Bank note' which is also mentioned in Section 3 and which the Petitioner is obligated to pay."

The trial conducted a hearing on the matter. No stenographic report or verbatim recording of the hearing was made. Accordingly, we must rely on an Agreed Statement of the Evidence filed pursuant to Tenn. R. App. P. 24(c) for our recitation of the facts.

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[1] Wife also filed a counter-claim, in which she alleged that Husband had failed to pay medical expenses for the children which the MDA required and that he should be ordered to pay additional child support. Since the issues raised by her counter-claim were not raised on appeal and therefore are not before this court, we will not address them.

Both parties had executed a Community Bank note for $24,111.50, dated August 21, 2000, which showed on its face that it was secured by the Ford Explorer. Husband testified, however, that the 1992 Explorer (purchased used in 1994) cost less than that amount when purchased and that the note was actually for a debt consolidation loan which included other obligations beside the debt on the Explorer. He also testified that prior to divorce, the parties went to Community Bank to try to get their finances in order and that the bank had required the parties to break the indebtedness into two notes, since more was owed on the vehicle that it was worth. Thus, at the time the MDA was executed, the original note had been cancelled and superseded by two other obligations: a note in the amount of $12,281.74,[2] and what the parties designate as a "charge-down obligation" of approximately $9,000.[3]

Husband testified that he considered both obligations to be indebtedness related to the Explorer, since they replaced the previous note on the vehicle. He also testified that he did not consider either note to have been "small," given the parties' financial condition at the time of divorce. He testified that his take-home pay as a Tennessee State Trooper was about $2,000 per month and that Wife handled all the parties' financial transactions during the course of the marriage, but that they had problems paying their bills and had to seek credit counseling. He further testified that at the time of the parties' divorce, they owed a debt of approximately $400 to Community Bank related to a bad check, which he subsequently paid off.

Wife testified that although she handled the parties' finances, Husband always knew what was going on. She also testified that she paid $12,000 in credit card debts that were owed at the time of divorce but were not listed in the parties' MDA. She claimed that the "small Community Bank note" cited in the MDA referred to the $24,111.50 note or its successor, and that the note was referred to as small to distinguish it from the larger Community Bank note of approximately $80,000 related to the parties' mortgage note on the marital home. She stated that the mention in the MDA of both the "small Community Bank note" and the "Community Bank note on her Explorer" could only be explained as a typographical error.

After the hearing, the court filed its order, which declared that it found an error in the wording of the MDA "based upon the evidence before it concerning the past conduct of the parties and the intent of the parties at the time the Marital Dissolution Agreement was entered." The court found the note on the Explorer and the small Community Bank note to be one and the same and ordered that the "Marital Dissolution Agreement is amended and revised so as to assign

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[2] The face of the note for $12,281.74 lists three vehicles in the section for titles securing the loan and gives the VIN numbers for each. They are a 1992 Ford Explorer, a 1987 Mustang, and a 1992 Ford Bronco. The listings for the Explorer and the Mustang were typed in, suggesting that both titles were originally required to secure the loan. However, a line has been drawn through the information about the Mustang, and the Bronco information was written in by hand, but not initialed. Another section of the note recites that the parties are giving the bank a security interest in a 1992 Ford Explorer and a 1987 Ford Mustang.

[3] According to Husband, a note executed on December 10, 2001 for $11,904.64, secured by the Explorer and signed by Husband and his new wife memorialized the "charge-down obligation."

responsibility to Mr. Wynne for the payment of the $12,281.74 note to Community Bank and the $9,489 charge down to Community Bank."

Husband filed a motion to alter or amend the court's judgment or for new trial. He argued that because the MDA had been merged into the divorce decree, and because that decree had become final, the court's order implicated the provisions of Tenn. R. Civ. P. 60, which governs the manner in which relief from final judgments or orders may be granted. Under part 60.02(1) of that rule, relief from mistakes, inadvertence, surprise or excusable neglect may be granted if a motion to correct the alleged error is made within a reasonable time, and "not more than one year after the judgment, order or proceeding was entered or taken." In this case Wife's answer had been filed more than two years after the entry of the divorce decree.

After a hearing on Husband's motion to alter or amend, the trial court declined to grant that motion. It left in place the allocation of debt set out by its order but amended that order "to reflect that the Court was *interpreting* the parties' Marital Dissolution Agreement in reaching its decision . . . rather than amending or revising the Marital Dissolution Agreement inasmuch as the court recognizes that Rule 60 Tenn. R. Civ. P. prohibits amending or modifying the parties' Marital Dissolution Agreement." (original emphasis in court's order). This appeal followed.

III. ANALYSIS

The interpretation of a contract is a matter of law. The trial court's conclusions of law are reviewed de novo on appeal, but are accorded no presumption of correctness. *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993); *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 335-36 (Tenn. 1983); *Hillsboro Plaza Enterprises v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993). In contrast, our review of the trial court's findings of fact are de novo upon the record of the proceedings below, "accompanied by a presumption of the correctness of those findings, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d).

This appeal involves both conclusions of law and factual findings, which have been combined in Paragraph 3 of the court's order of March 1, 2004. We reproduce it below in its entirety:

> The Court finds an error in the wording of the Marital Dissolution Agreement based upon the evidence before it concerning the past conduct of the parties and the intent of the parties at the time the Marital Dissolution Agreement was entered. The Court finds that the note on the Explorer and the small Community Bank loan are one and the same and that husband is responsible for the payment of such obligation. At the time of the divorce, this obligation consisted of a $12,281.74 note from Community Bank and a charge down obligation to Community Bank in the amount of $9,489.00. The Court finds that both these obligations are the responsibility of Mr. Wynne,

However, Mr. Wynne has refinanced the larger obligation and will be solely responsible for the refinanced amount.[4]

The trial court apparently reasoned that because of "an error in wording" two debt obligations which are referenced separately in the MDA and which are specifically allocated one to each party were actually meant to be a single obligation which only the husband was obligated to pay. The court went on to observe that at the time of divorce this single obligation took the form of two separate debts to Community Bank.

Husband challenged this finding on the basis of the time limitation in Tenn. R. Civ. P. 60.02(1). The trial court amended its order to signify that its conclusions as to the parties' debts should be construed to be merely an interpretation of the parties' Marital Dissolution Agreement, rather than a modification of that agreement. We agree that the court's only legitimate function in the proceeding was to interpret the MDA and that Rule 60.02 is not relevant to that process. However, after conducting a *de novo* review, we cannot agree with the interpretation reached by the trial court.[5]

A Marital Dissolution Agreement is essentially a contract entered into by a husband and wife in contemplation of divorce, and it is construed and enforced in the same way as other contracts. *Barnes v. Barnes* 193 S.W.3d 495, 498 (Tenn. 2006); *Johnson v. Johnson*, 37 S.W.3d 892, 896 (Tenn. 2001); *Honeycutt v. Honeycutt*, 152 S.W.3d 556, 561 (Tenn. Ct. App. 2003); *Gray v. Gray,* 993 S.W.2d 59, 63 (Tenn. Ct. App. 1998). The cardinal rule for the interpretation of contracts is to ascertain the intention of the parties based upon the usual, natural and ordinary meaning of the contractual language and to give effect to that intention consistent with legal principles. *Guiliano v. Cleo*, 995 S.W.2d 88, 95 (Tenn. 1999); *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578 (Tenn. 1975); *Rainey v. Stansell,* 836 S.W.2d 117, 119 (Tenn. Ct. App. 1992).

In order to arrive at the intention of the parties to a contract, the courts do not attempt to ascertain the parties' state of mind at the time the contract was executed, but rather their intentions as actually embodied and expressed in the contract as written. *Petty v. Sloan*, 277 S.W.2d 355 (Tenn. 1955); *Sutton v. First Nat'l Bank of Crossville*, 620 S.W.2d 526 (Tenn. Ct. App. 1981). Thus,

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[4]The Statement of the Evidence states that Husband "...testified that after the parties divorced, the $12,281.74 note had to be redone in order to get clear title to the Mustang so he could get a replacement vehicle."

[5]We note that even without considering Rule 60, the court would still have very little power to modify the allocation of debt in the Marital Dissolution Agreement. Such an agreement is a contract between parties contemplating divorce. *Johnson v. Johnson*, 37 S.W.3d 892, 896 (Tenn. 2001). *Gray v. Estate of Gray*, 993 S.W.2d 59, 63 (Tenn. Ct. App.1998). After a divorce decree becomes final, those parts of the MDA that involve child support and alimony are merged into the decree, and the trial court retains the statutory power to modify the decree as to those matters when justified by changed circumstances. *Penland v. Penland,* 521 S.W.2d 222, 224 (Tenn. 1975); *Wade v. Wade*, 115 S.W.3d 917, 924-925 (Tenn. Ct. App. 2002). However, to the extent that an MDA is an agreement as to distribution of marital property it does not lose its contractual nature by merger into the decree of divorce and it is not subject to later modification by the court. *Towner v. Towner*, 858 S.W.2d 888, 890 (Tenn. 1993); *Penland v. Penland*, 521 S.W.2d 222 at 224.

when an agreement has been reduced to writing, its correct interpretation must be determined from the terms of the instrument itself. If the language of the contract is plain and unambiguous, then the court's function is simply to interpret it as it is written, according to its plain terms. We can find no ambiguity in the plain terms of the MDA. They simply allocate the marital debts between the parties, requiring each party to pay particular debts and relieving each from any responsibility for the debts the other party is required to pay.

The ambiguities in this case stem from the uncertainty of matching the actual obligations that existed to the particular debts identified in the MDA. The MDA does not make reference to loan numbers or dates to identity the individual obligations, nor does it set out the exact monetary value of the obligations it allocates. Further, the debts in question have been subject to several rounds of refinancing, with changes in the collateral that secures them.

The trial court dealt with these complications by deciding that the debt associated with Wife's Ford Explorer, which the MDA declares in two places to be Wife's responsibility, was actually one and the same as the "small Community Bank note," which Husband was obligated to pay. The court stated that it had looked at the plain meaning of the words in the MDA and taken into account the intent of the parties and their conduct since entering into the agreement. However, the plain meaning of the MDA is that Wife is to remain responsible for the debt on the Explorer. The only conduct suggesting a contrary intention was the husband's payment of installments on a debt which still carried his name and which he contended he paid in order to salvage his credit.

We must apply several other well-recognized principles of contract interpretation. In ascertaining the intent of the parties, the court should strive to construe all the provisions in the contract in harmony with each other, if that is possible, to promote consistency and to avoid contradictions between the various provisions of a single contract. *Guiliano v. Cleo*, 995 S.W.2d at 95; *Rainey v. Stansell,* 836 S.W.2d at 118-19. Contracts must be construed as a whole and effect must be given to every part. *Wilson v. Moore*, 929 S.W.2d 367, 373 (Tenn. Ct. App. 1996); *Paul v. Insurance Co. of North America*, 675 S.W.2d 481, 483 (Tenn. Ct. App. 1984).

A court must take the contract as written, and may not make a new and different contract for the parties that they did not intend to make for themselves. *Humphries v. West End Terrace, Inc.*, 795 S.W.2d 128 (Tenn. Ct. App. 1990); *Heyer Jordan & Associates v. Jordan*, 801 S.W.2d 814 (Tenn. Ct. App. 1990). Courts may not make new contracts for the parties under the guise of unwarranted interpretation. *Rogers v. First Tenn. National Bank Association*, 738 S.W.2d 635 (Tenn. Ct. App 1987). We should construe MDAs fairly and reasonably, and we should avoid rewriting these agreements under the guise of "construing" them. *Elliott v. Elliott,* 149 S.W.3d 77, 84 (Tenn. Ct. App. 2004). Ambiguities in a contract should be construed against the party that drafted it. *Hanover Insurance Co. v. Haney,* 425 S.W.2d 590, 592 (Tenn. 1968). *Frank Rudy Heirs Associates v. Moore & Associates, Inc.,* 919 S.W.2d 609, 613 (Tenn. Ct. App. 1995). Thus, any ambiguity in the MDA should be construed against wife, since it was drafted by her attorney.

Given the rules of construction, we conclude that the MDA unambiguously allocates the debt for the Explorer to Wife. It would amount to a total negation of the express intention of the

parties to excuse her obligation to pay it. Two separate provisions in the MDA specifically refer to the wife's obligation as the debt on the Explorer and "the Community Bank note on her Explorer." The proof shows that at the time the MDA was executed, there was only one Community Bank note on the Explorer, in the amount of $12,281.74. However, the parties also acknowledged the existence of a separate "charge-down obligation" which was not then in the form of a note, and which the Husband insists was derived from the original note on the Explorer.

To effectuate the intention of the parties, this court must hold Wife responsible for the debt on the Explorer. The only question is whether this debt is represented by one note or two. The resolution that most accurately matches the language of the MDA and the evidence regarding debts at the time of the divorce is to make Wife responsible for the principal amount on the only note secured by the Explorer at the time the MDA was executed, or $12,281.74. Since Husband has re-financed that note, Wife cannot satisfy the obligation by paying the bank, but must make payments directly to Husband. Accordingly, Husband is entitled to a judgment against Wife in the amount of $12,281.74.

IV.

The order of the trial court is modified to make the wife responsible for the principal amount of $12,281.74. We direct the trial court to establish an equitable schedule of installment payments and to resolve any additional issues that may arise in implementing this decision, including interest. We remand this case to the Chancery Court of Giles County for any further proceedings necessary. Divide the costs on appeal equally between the appellant, Joseph Nolan Wynne, and the appellee, Gina Orlene Wynne Ament.

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PATRICIA J. COTTRELL, J.